

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ARC AUTOMOTIVE, INC.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article **9-A** of the Tax Law for the Fiscal Years
Ended August 31, 1979 and August 31, 1980.

In the Matter of the Petition

of

ARC AUTOMOTIVE, INC.

DECISION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 & 29 :
of the Tax Law for the Period March 1, 1979
through August 31, 1980,

In the Matter of the Petition

of

ANTHONY & MARY L. CANCEMI

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1979 and 1980.

x

Petitioner, ARC Automotive, Inc. 434 Clinton Avenue, Hempstead, New York 11550, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article **9-A** of the Tax Law for the fiscal years ended August 31, 1979 and August 31, 1980 (File No. 45094), and a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through August 31, 1980 (File No. 43585).

Petitioners, Anthony and Mary L. Cancemi, 434 Clinton Avenue, Hempstead, New York 11550, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1979 and 1980 (File No. 43590).

A consolidated hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 26, 1986 at 1:15 P.M. Petitioners appeared by Steven A. Cohen, C.P.A. The Audit Division appeared by John P. Dugan, **Esq.** (Lawrence A. Newman, **Esq.** of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' additional corporation franchise, sales and use and personal income taxes due.

FINDINGS OF FACT

1. On February 23, 1983, as the result of a field audit, the Audit Division issued two notices of deficiency pursuant to Article **9-A** against petitioner, ARC Automotive, Inc. ("ARC"). The first was in the amount of \$22,271.70 plus interest of \$9,112.69 and additional charges of \$1,113.59 for a total due of \$32,497.98 for the fiscal year ended August 31, 1979. The second was in the amount of \$25,921.60 plus interest of \$8,402.74 and additional charges of \$1,296.08 for a total due of \$35,620.42 for the fiscal year ended August 31, 1980.

2. On March 16, 1983, the Audit Division issued a Notice of Deficiency against petitioners, Anthony and Mary L. Cancemi, for personal income tax due of \$72,944.50 plus penalty of \$3,647.22 and interest of \$20,675.92 for *a* total due of \$97,267.64 for the years 1979 and 1980.

3. On March 25, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against ARC in the amount of \$26,928.09, plus interest of \$9,326.05, for a total of \$36,254.14 for the period March 1, 1979 through August 31, 1980.

4. On January 14, 1982, ARC executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through February 28, 1980 to June 20, 1983.

5. Petitioner Anthony Cancemi is the president and 100 percent shareholder of ARC. During the audit period ARC owned and operated a full service gasoline station located at 434 Clinton Avenue, Hempstead, New York. From January 1, 1980 through August 31, 1980, ARC also owned and operated a self-service gas station located at 144 Hempstead Turnpike, West Hempstead, New York. Prior to that, Mr. Cancemi owned and operated the latter as a sole proprietorship.

6. The Audit Division commenced a concurrent corporation and sales tax audit of ARC for the fiscal years ended August 31, 1979 and August 31, 1980 with a request for books and records. The only records made available were a general ledger, some expense information and a quantity of pre-numbered sales invoices for automobile repairs performed by ARC; however, the numbers indicated that approximately half of the invoices were unaccounted for. Furthermore, the general ledger provided did not segregate purchases and sales for the two gas stations. In the absence of adequate records, the Audit Division resorted to external indices to reconstruct ARC's gasoline and repair sales for the audit period. Sales tax was assessed only for those quarters which were within the period of limitation for assessment.

7. The franchise tax deficiencies were predicated solely on the results of the sales tax audit. Additional taxable sales attributed to the service stations owned by ARC were deemed additional income to the corporation for corresponding periods. The auditor reviewed and verified ARC's expenses for fiscal year 1980. Finding that they were properly recorded and deducted for that year, the auditor decided not to conduct a review for fiscal year 1979.

8. The auditor treated the additional corporate income as a constructive dividend to Anthony Cancemi and increased his taxable income for the years 1979 and 1980 accordingly. In addition, the auditor conducted a review and analysis of Anthony and Mary L. Cancemi's income tax returns for calendar years 1979 and 1980. Certain medical and bad debt expenses and other itemized deductions were disallowed for lack of substantiation. The audit also revealed that Mr. and Mrs. Cancemi had unreported dividends in 1980 of \$486.00 and their income was increased by that amount. Markup figures obtained during a field visit to the Hempstead Turnpike Station were applied to gasoline purchases reported on schedule C of petitioners' 1979 Federal return. The resulting sales figures were in substantial conformity with filed sales tax returns; consequently, no adjustments were made on this basis. Penalties were assessed under section 685, subdivision (b) of the Tax Law for a deficiency due to negligence or intentional disregard of the Tax Law.

9. Following a tax conference, petitioner submitted to the Audit Division a letter from Mobil Oil Corporation ("Mobil") verifying the number of gallons of gasoline purchased by petitioners for each gas station in calendar years 1978, 1979, 1980. Although this information was inadequate to verify petitioners' reported sales, the Audit Division agreed to use it to reconstruct ARC'S gasoline and repair sales for the audit period. Because Mobil reported purchases

for each location by calendar year while **ARC** reported on a fiscal year basis, the auditor annualized the figures received from Mobil and calculated an average selling price per gallon of gasoline, an average number of gallons of gasoline purchased by **ARC** in each fiscal year and an average number of gallons of gasoline sold by **ARC** in each fiscal year. Using Mobil's figures and **ARC'S** general ledger, the auditor computed the ratio of gasoline purchases to total purchases and used this figure to determine repair purchases and the markup on those purchases. The auditor's arithmetical steps in arriving at audited taxable sales is summarized below:

	<u>1979</u>	<u>1980</u>	<u>1979 & 1980</u>
Audited Gasoline Sales			
Gallons Purchased	\$430,889.00	\$726,685.00	
Avg. selling price per gal.	x 1.127	x 1.127	
Audited Gasoline Sales	<u>\$485,611.90</u>	<u>\$818,973.99</u>	
 Audited Repair Sales			
Repair Purchases	\$ 22,969.25	\$ 20,273.30	
Markup 182.5%	41,918.88	36,998.77	
Audited Repair Sales	<u>\$ 64,888.13</u>	<u>\$ 57,272.07</u>	
 Total Audited Sales	\$550,500.03	\$876,246.06	\$1,426,746
Less Excise Tax			<u>- 92,606</u>
Total Audited Taxable Sales			<u>\$1,334,140</u>
Taxable Sales Reported			<u>1,151,499</u>
 Additional Taxable Sales			\$ 182,641

The auditor then calculated an error rate of 13.69 percent by dividing additional taxable sales by total audited taxable sales. Taxable sales reported by **ARC** in each quarter within the period of limitation for assessment were then increased by the error rate. This resulted in additional taxable sales for the period March 1, 1979 through August 31, 1980 of \$136,685.06 with a revised tax

due on that amount of \$9,567.97,¹ which is the sales tax liability now asserted.

10. Based on the revised sales tax assessment, the auditor recalculated the franchise tax deficiencies. The Audit Division conceded a tax due of \$393.36 plus interest for the fiscal year ended August 31, 1979 and a tax due of \$16,580.85 plus interest for the fiscal year ended August 31, 1980. No additional charges are asserted.

11. After the prehearing conference, petitioners, Anthony and Mary L. Cancemi, submitted additional information to the Audit Division which enabled the auditor to perform an audit using the cash availability method. As a result, the Audit Division eliminated the constructive dividends to Anthony Cancemi for the years 1979 and 1980, allowed previously disallowed medical and bad debt deductions and sustained disallowances of certain unsubstantiated itemized deductions. The Audit Division now asserts personal income tax deficiencies in the amount of \$331.72 plus interest for the year 1979 and \$207.14 plus interest for the year 1980 and recommends cancellation of all penalties.

12. Following the tax appeals hearing, petitioner's representative submitted a sample of daily records kept by ARC (known as "shift sheets") and a summary of those records which established that the average selling price of gasoline for the period September 1, 1978 through August 31, 1979 was 80.99 cents per gallon. The selling price of \$1.127 per gallon utilized by the auditor was based on figures from the fiscal year ended August 31, 1980.

1 At hearing, the Audit Division conceded that the error rate was calculated incorrectly. The correct method of calculation would have yielded an

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Petitioner did not provide the Audit Division with any record which would serve as a verifiable record of taxable sales. Under the circumstances, the Audit Division's **use** of a test period and a markup percentage audit was proper in accordance with section 1138(a) of the Tax Law.

B. That although the sales tax audit methodology utilized was reasonable, petitioners have established that ARC's average selling price for a gallon of gasoline in the fiscal year ended August 31, 1979 was 80.99 cents. The Audit Division is directed to recompute taxable sales accordingly. Appropriate adjustments are to be made to the corporation franchise tax due as modified (Finding of Fact "10") and the sales tax due as modified (Finding of Fact "9") to conform with this recomputation.

C. That the income tax deficiencies asserted against Anthony and Mary L. Cancemi are reduced to \$331.72 plus interest for the year 1979 and \$207.14 plus interest for the year 1980.

D. That **a** penalty was imposed under section 685, subdivision (b) **of** the Tax Law which provides for the same "[i]f any part of a deficiency is due to negligence or intentional disregard of [Article 22]." Penalties were initially imposed for substantial underreporting of income. The revised assessments arise solely from petitioners' inability to substantiate certain business expenses. Moreover, the Audit Division has determined that petitioners accurately reported their income **and has** recommended cancellation of penalties. **Taxpayers**


as the remaining deficiency was not due to negligence or intentional disregard of the taxing statutes; penalties are cancelled.

E. That the petitions of ARC Automotive, Inc., and Anthony and Mary L. Cancemi are granted to the extent indicated in Conclusions of Law "B" and "C"; that the notices of deficiency issued on February 23, 1983 and March 16, 1983 and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 25, 1983 shall be modified accordingly; and that, in all other respects, the petitions are denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER